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Attorney for Defendant
J. TONY SERRA

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

CR 05-171

v.

DEFENDANT'S PLEA AND
SENTENCING MEMORANDUM

J. TONY SERRA,

Defendant.

I. INTRODUCTION

Pursuant to Plea Agreement, Tony Serra will enter pleas of guilty to an Information charging him in two counts with a misdemeanor violation of Title 26 U.S.C. 7203, Willful Failure to Pay Income Tax, for the tax years 1998 and 1999. The United States and Mr. Serra agree that the advisory United States Sentencing Guidelines (USSG) in this case result in Total Offense Level 12. Mr. Serra is a Criminal History Category I offender.

The terms and conditions of the Plea Agreement include that Mr. Serra will pay restitution to the United States in the amount of \$100,000, representing unpaid taxes for the tax years 1997 through 2001, and that he maintains the right to move for a

1 downward departure from the established guideline.¹ Mr. Serra
 2 comes now before the Court requesting that the total circum-
 3 stances of his offense behavior, his background and prior good
 4 deeds, and his obligations as a trial attorney, all warrant a
 5 sentence of probation.

6 **II. COURT CAN CONSIDER ALL RELEVANT FACTORS**

7 Mr. Serra's pleas will be entered in the wake of the
 8 recent landmark decision in United States v. Booker, 160 L.Ed.2d
 9 621, 125 S.Ct. 738 (2005). Booker renders the Guidelines as
 10 advisory only, and instructs the sentencing courts to consider
 11 the Guidelines in context of all of those factors enumerated in
 12 Title 18 U.S.C. 3553(a). In the Booker Remedy Opinion, the Court
 13 stated:

14 "We answer the question of remedy by
 15 finding the provision of the federal
 16 sentencing statute that makes the
 17 Guidelines mandatory, 18 U.S.C.A.
 18 3553(b)(1) (Supp. 2004), incompatible with
 19 today's constitutional holding. We conclude
 20 that this provision must be severed and
 21 excised, as must one other statutory
 22 section, 3742(e) (main ed. And Supp. 2004),
 23 which depends upon the Guidelines mandatory
 24 nature. So modified, the Federal Sentencing
 Act, See Sentencing Reform Act of 1984, as
 amended, 18 U.S.C. 3551 *et seq.*, 28 U.S.C.
 991 *et seq.*, makes the Guidelines
 effectively advisory. It requires a
 sentencing court to consider Guidelines
 ranges, see 18 U.S.C.A. 3553(a)(4) (Supp.
 2004), but it permits the court to tailor
 the sentence in light of other statutory
 concerns as well, see 3553(a) (Supp.
 2004)." At 651.

25 The Guideline range is now neither mandatory, nor
 26 "presumptive," as the Court must now consider 18 U.S.C. 3553(a)

27 ¹ As the Guidelines are now advisory, formal downward
 28 departure motions are no longer necessary (see below).

1 in its entirety and impose a sentence "sufficient, but not
2 greater than necessary, to comply with the purposes set forth in
3 paragraph (2) of this subsection." The court, in determining the
4 particular sentence to be imposed, shall consider:

5 (1) The nature and circumstances of the offense and
6 the history and characteristics of the
7 defendant;

8 (2) The need for the sentence imposed --

9 (a) to reflect the seriousness of the offense,
10 promote respect for the law and provide just
11 punishment for the offense;

12 (b) to afford adequate deterrence to criminal
13 conduct;

14 (c) to protect the public from further crimes of the
15 defendant; and

16 (d) to provide the defendant with needed education or
17 vocational training, medical care or other
18 correctional treatment in the most effective manner;

19 With the Guidelines advisory, they now become but one
20 factor to be considered by the Court in fashioning a sentence.
21 Indeed, the requirement of considering the provisions of 18
22 U.S.C. 3553(a) restores to the Court its power and obligation to
23 consider factors that the Guidelines effectively prohibited from
24 consideration (e.g., Age, USSG 5H1.1; Education and Vocational
25 Skills, USSG 5H1.2; Mental and Emotional Condition, USSG 5H1.3;
26 Physical Condition Including Drug or Alcohol Dependence, USSG
27 5H1.4; Employment, USSG 5H1.5; Family Ties and Responsibilities,
28 USSG 5H1.6; Socio-economic Status, USSG 5H1.10; Civic and
Military Contributions, USSG 5H1.11; and Lack of Youthful
Guidance, USSG 5H1.12.). To consider the "history and
characteristics of the defendant," the Court must now consider
factors the Guidelines eschewed. Therefore, in light of Booker,

1 the Court need no longer consider "departures," and may consider
2 a more expansive set of facts for sentencing.²

3 **III. BACKGROUND**

4 Tony Serra was born and raised in San Francisco. He is one
5 of three sons born to his Spanish-Moorish father and Russian-
6 Jewish mother. His parents had only elementary school educations
7 and his father worked as a foreman in a jelly bean factory in San
8 Francisco. Tony's brothers are both accomplished. His brother
9 Richard, a resident of New York, is a world renowned sculptor³
10 and his brother Rudy is an art professor at the University of
11 Vermont. Raised in a modest working class home, Tony and his
12 brothers were taught the values of ideas and art, not the value
13 of material possessions. Tony has passed on those values to his
14 own five children, Ivory, Shelter, Chime, Wonder and Lilac. All
15 have university or post graduate degrees and are engaged in such
16 fields as sculpture, photography, off-Broadway acting, play
17 writing, movie producing and fashion.

18 Tony attended public schools in San Francisco, where, upon
19 graduation from high school, he was awarded the Bank of America
20 Giannini Award for most promising graduating student in the
21 field of English. He was also an athlete, having earned "all-
22 city" honors in both baseball and football. He also played
23 varsity basketball. When he graduated he was offered the

24
25 ² As will be noted below, however, a number of sentencing
26 factors the Court should consider as downward departure issues,
27 even under a mandatory Guideline system, are present in this
28 case.

³ Richard Serra's 140-ton steel sculpture "Ballast" was
recently installed at U.C. San Francisco's Mission Bay Campus.

1 opportunity to play professional baseball. He opted to attend
2 Stanford University instead.

3 At Stanford, the sheer amount of activity in which Tony
4 engaged is staggering. He worked to support himself throughout
5 his time at Stanford, sometimes working the graveyard shift at a
6 nearby cardboard factory. He was academically outstanding. In
7 addition, Tony played varsity baseball and football, and was a
8 varsity boxer. He graduated in 1959 with a degree in Philosophy.
9 He then entered Boalt Hall, the University of California at
10 Berkeley Law School, at which he was in the top 10% of his class
11 and on Law Review. After graduation, he began his law career, as
12 a deputy district attorney in Alameda County. He left the
13 prosecutor's office one year later.

14 Tony Serra has been a trial lawyer, primarily criminal
15 defense and civil rights, for over 40 years. His work has
16 resulted in numerous awards, including in 1982, runner-up "Best
17 Lawyer in America" by American Lawyer Magazine, 1992, Drug Policy
18 Foundation (Washington, D.C.) Achievement in the Field of Law,
19 1993 Boalt Hall Law Review "Alumnus of the Year," 1994 Charles
20 Garry Award, 1997 American Civil Liberties Union Benjamin Dreyfus
21 Civil Liberties Award, 2003 Lifetime Achievement Award by
22 McFetridge-American Inn of Court, and co-awardee of "2003 Trial
23 Lawyer of the Year" by Trial Lawyers for Public Justice. In
24 addition, Tony has been a speaker at hundreds of legal profes-
25 sional organizations, addressing many legal and social issues.
26 His work load is enormous, often resulting in actual trial work
27
28

1 as much as 11 months out of the year.⁴

2 Tony's success as a trial lawyer and advocate has not
3 translated, intentionally, into material aggrandizement. At the
4 beginning of his career, Tony eschewed the material benefits of a
5 successful law practice. In his own words:

6 I took an informal vow of poverty. I vowed
7 that I would never take profit from the
8 practice of law, that I would not buy
9 anything new, that I would recycle every-
10 thing, that I would own no properties - no
11 stocks or bonds, no images of prosperity. I
12 still drive an old junk of a car. I still
13 barely make the rent each month; I have
14 accumulated nothing by way of savings, and
15 I live from hand to mouth.

16 Unpublished Manuscript, "Lust For Justice -
17 Confessions of a Maverick Lawyer," J. Tony
18 Serra and Paulette Frankl, p. 62.

19 Tony has never abandoned his vow and all who know him can
20 attest to his lifestyle as one who does not seek, nor value,
21 material possessions or success. Indeed, at any given time, fully
22 one half, and often more, of his case load is comprised of *pro*
23 *bono* cases, the costs of which he often pays out of his own
24 pocket. He has so little money, his children have been educated
25 by the generosity of their famous sculptor uncle.

26 The present prosecution occurs in the context of Tony
27 Serra's relationship to money. He has failed to **pay** taxes. He has
28 not failed to **file** taxes.⁵ He has entered into discussions with

29 ⁴ For the remainder of 2005 alone, Tony has six trials
30 scheduled, the last of which, United States v. Flavia Sandoval,
31 is to commence on November 15, 2005, in U.S. District Court,
32 Eastern District of California at Fresno.

33 ⁵ The Court will be made aware that Mr. Serra previously
34 failed to **file** tax returns, for which he was prosecuted and
35 punished. He learned that lesson and has not repeated it.

1 the government to endeavor to pay taxes that are owing. Many
 2 people whom Tony has touched in his life and career are coming
 3 forward to aid him at this time and, through their efforts and
 4 compassion, will help Tony pay his debt to the government. Each
 5 person recognizes that it is Tony's somewhat dysfunctional
 6 relationship to money that lies at the root of his offense
 7 behavior and not greed or self-aggrandizement.

8 **IV. ANALYSIS OF SENTENCING FACTORS**

9 In the wake of Booker, much scholarship has and will be
 10 forthcoming, providing guidance in federal sentencing. Several
 11 district courts have already been heard from and one in particu-
 12 lar has provided a framework for sentencing in the realm of
 13 "advisory Guidelines." In United States v. Ranum, 353 F.Supp.2d
 14 984 (E.D. Wisc. 2005), Judge Adelman stated:

15 I determined that the factors set forth in
 16 § 3553(a) fell into three general
 17 categories: the nature of the offense, the
 18 history and character of the defendant, and
 19 the needs of the public and the victims of
 the offense. I analyzed each category and
 in so doing considered the specific
 statutory factors under § 3553(a),
 including the advisory guidelines. *14

20 Tying the court's analysis to the factors outlined in
 21 section 3553(a), enables appropriate review of the sentence.

22 And in this instance those factors, in
 23 addition to the past two decades of
 appellate practice in cases involving
 departures, imply a practical standard of
 24 review already familiar to appellate
 courts: review for 'unreasonableness.'
 25 . . . Section 3553(a) remains in effect,
 26 and sets forth numerous factors that guide
 sentencing. Those factors in turn will
 27 guide appellate courts, as they have in the
 past, in determining whether a sentence is
 unreasonable.
 28 Booker, at 660-661.

1 **The Nature of the Offense:** "The Commission intends the
2 sentencing courts to treat each Guideline as carving out a
3 'heartland,' a set of typical cases embodying the conduct that
4 each Guideline describes. When a court finds an atypical case,
5 one to which a particular Guideline linguistically applies but
6 where conduct significantly differs from the norm, the court may
7 consider whether a departure is warranted." (USSG Ch. 1, Pt A,
8 Section 4(b)). See, Koon v. United States, 518 U.S. 81, 92 (1996)
9 (a departure is warranted if the case is "unusual enough for it
10 to fall outside the heartland of cases in the guidelines.") With
11 this statement, the Sentencing Commission expressed its
12 recognition that there are atypical cases that warrant special
13 consideration by the Court. Although this statement was
14 promulgated under the mandatory Guideline system, it is equally
15 applicable to the present case.

16 Typically, the failure to pay tax is motivated by greed,
17 financial desperation, or simple self-aggrandizement. None of
18 those motivations exists in the present case.⁶ Tony Serra's
19 failure to pay taxes, which he now intends to do with the help of
20 many friends, is the result of his vow of poverty, to which he
21 assiduously adheres, and his apparent "non-relationship" to
22 money. He lives a hand-to-mouth existence, buys virtually
23 nothing, and keeps only enough money to exist and pursue his
24 cases. As a result, even under an advisory Guideline system, the
25 Offense Level 12 agreed to by the parties clearly overstates this

26
27 ⁶ For example, if Mr. Serra were motivated by money, he
28 would not, as he did, refuse to accept any portion of the judgment of over \$4 million awarded in the Judi Bari and Darryl Cherney v. City of Oakland and FBI case.

1 defendant's culpability. In United States v. Brennick, 134 F.3d
2 10 (1st Cir. 1998), the court allowed for a downward departure
3 where the sentencing court determined that the defendant's
4 motivation for the tax offense was relatively benign in
5 comparison to other tax evasion offenses. Such is the case here,
6 where Mr. Serra did not fail to pay taxes because he wished to
7 spend the money on other things. He simply did not have the
8 money.

9 Further, as another consequence of Mr. Serra's peculiar
10 relationship to money, the agreed upon "tax loss" for Guideline
11 purposes, and thus the Level 12 determination, is a tax loss that
12 does not factor in Mr. Serra's expenses. See, United States v.
13 Martinez-Rios, 143 F.3d 662 (2nd Cir. 1998) (the court can
14 consider legitimate but unclaimed deductions if it results in "a
15 more accurate determination" of tax loss.) As indicated above,
16 Mr. Serra often funds costs in *pro bono* cases, costs for which he
17 has not sought deductions on his taxes. Although it is true that
18 there is income on which he owes taxes, the figure is somewhat
19 less than the agreed upon tax loss in the Plea Agreement. The
20 exact figure we do not know because of an absence of records.

21 **The History and Character of the Defendant:** Of course,
22 during the era of mandatory Guidelines, the Court was prohibited
23 from considering many factors that are directly related to the
24 history of the defendant (see above). That restriction is now
25 lifted. The Court may now appropriately consider Mr. Serra's age
26 of 70 (USSG 5H1.1), his physical condition and vulnerability
27 (USSG 5H1.4), his employment history and present employment
28 obligations (USSG 5H1.5), and his many civic contributions (USSG

1 5H1.11).

2 At age 70, Mr. Serra has undergone hip replacement
3 surgery. During his career, he cross-examined and effectively
4 compromised the value of many government informants, many of whom
5 populate the Bureau of Prisons. As the Court is aware, fully 60%
6 of all downward departures under the mandatory Guideline system
7 were for "substantial assistance" to the government. The number
8 of "snitches" in the Bureau of Prisons is enormous and Mr. Serra
9 is not well regarded by them.⁷ Indeed, there is concern that Mr.
10 Serra would be targeted by angry snitches, whose value he
11 diminished during cross examination and whose "benefits" may have
12 been reduced as a result of their diminished value. Physical
13 condition and vulnerability in prison are factors the Court may
14 consider at sentencing.

15 In United States v. Lara, 905 F.2d 599 (2nd Cir. 1990),
16 the court granted a downward departure for a defendant who
17 appeared physically vulnerable to menacing elements in the prison
18 system. Other courts have reached the same conclusion. See,
19 United States v. Graham, 83 F.3d 1466, 1481 (D.C. Cir. 1996),
20 United States v. Maddox, 48 F.3d 791, 797-98 (4th Cir. 1995),
21 United States v. Tucker, 986 F.2d 278,280 (8th Cir. 1993), *cert.*
22 *denied*, 114 S.Ct. 76 (1993), and United States v. Gonzales, 945
23 F.2d 525 (2nd Cir. 1991). In the Northern District of California,
24 a defendant whose guidelines called for a period of imprisonment
25 was sentenced to a halfway house after a downward departure for
26 potential vulnerability in prison. United States v. Bauer, CR 92-

27 ⁷ As a personal policy, Mr. Serra will not represent
28 government informants.

1 20027 RMW (1992).

2 Although under the present sentencing scheme the Court no
3 longer must identify a downward departure, section USSG 5H1.4,
4 Physical Condition, can now be considered in the context of the
5 provisions of 18 U.S.C. 3553(a) and is a factor to consider at
6 sentencing.

7 Tony Serra's sterling employment history and his present
8 professional obligations are also factors that the Court can
9 consider at sentencing. Under the mandatory Guideline system, a
10 downward departure was allowed when the incarceration of the
11 defendant would have a dilatory effect on innocent employees of
12 the defendant. See, United States v. Milikowsky, 65 F.3d 4 (2nd
13 Cir. 1995). In Mr. Serra's case, his incarceration would have a
14 devastating effect on those clients whom he is presently
15 representing. As indicated above, Mr. Serra has six more jury
16 trials scheduled for the year 2005 alone. There are 16 other
17 cases awaiting dates for trial, which will extend into 2006 and
18 perhaps beyond. It is possible that not all cases will proceed to
19 trial; however, historically, the vast majority of Mr. Serra's
20 cases do go to trial, rather than settle. Any incarceration of
21 Mr. Serra that prevents him from appearing on behalf of his
22 clients will have an extraordinarily negative impact on their
23 cases and should be considered by the Court at sentencing.

24 In fashioning a sentence that recognizes the seriousness
25 of Mr. Serra's transgression, while at the same time considering
26 his history, the Court must consider all of the *pro bono* work Mr.
27 Serra has performed over the years. For over 40 years of
28 practice, fully one-third to one-half of his caseload at any

1 given time is donated work. Indeed, Mr. Serra often funds cases
2 that he does for free. The *pro bono* work Mr. Serra has done is
3 an extraordinary civic contribution that has forwarded the ends
4 of justice in America. It is a factor worthy of consideration by
5 the Court at sentencing. See, United States v. Jones, 158 F.3d
6 492 (10th Cir. 1998) (defendant's long history of charitable
7 works justified downward departure), United States v. Sarafini,
8 233 F.3d 758 (3rd Cir. 2000) (charitable activities justified
9 downward departure), and United States v. Canoy, 38 F.3d 893 (7th
10 Cir. 1994) (charitable and civic activities may provide basis for
11 downward departure if exceptional).

12 **The Needs of the Public and the Victims of the Offense:**

13 Mr. Serra's deprivation of resources for the public weal renders
14 the "victim" of this case the public at large. In determining a
15 sentence, then, it is incumbent upon the Court to balance the
16 public's deprivation of Mr. Serra's tax payments against the
17 monumental public service he has provided, not only through his
18 *pro bono* work, but also through his insistence upon the rights
19 and liberties of the people he represents before the courts of
20 this country. His valiant fight to protect the interests of the
21 accused has a far reaching effect for all persons accused, both
22 guilty and not guilty. The work of an effective defense lawyer
23 inures benefit to all citizens, as it demands that the system
24 adhere to constitutional principles and rules that protect people
25 from the wrath of the state.

26 Also, Mr. Serra will pay his taxes. Many friends have
27 stepped forward to provide funds with which Mr. Serra will make
28 full restitution. Under the mandatory Guideline system, the

1 courts recognized full restitution as a basis for a downward
2 departure. See, United States v. Miller, 991 F.2d 552 (9th Cir.
3 1993). Full restitution is a mitigating factor, as it is
4 emblematic of acceptance of responsibility and an indication of
5 future compliance with the law.

6 The "needs of the public and victim" are essentially the
7 need for payment of the taxes due and the possible deterrent
8 value of this case, during this, the "tax season." Mr. Serra,
9 with the help of others, will pay his taxes due, according to the
10 requirements of the Plea Agreement, thus compensating the
11 "victim" of his offense.

12 The notion of deterrence has historically been very
13 difficult to assess. There are those who believe that deterrence
14 exists and those who do not. However, it can be categorically
15 stated that the publicity of this prosecution has already
16 achieved the potential for deterrence.⁸ The government is
17 reaping the publicity benefit of this case already. Mr. Serra is
18 accepting responsibility for his failure in this case and
19 acknowledges the government's right to collect taxes from him.

20 V. CONCLUSION

21 J. Tony Serra will appear before the Court to enter pleas
22 of guilty to two counts of misdemeanor failure to pay taxes. He
23 will make restitution of \$100,000 with the help of a number of
24 people who are supportive of him.

25 It is requested that the Court consider the overall
26 circumstances of both the offenses before the Court and the

27 ⁸ The charges against Mr. Serra were already published in
28 local newspapers.

1 background and history of Tony Serra. He is truly an unusual
2 defendant who brings a complex set of factors to be analyzed for
3 sentencing. Primarily, the Court should consider the etiology of
4 this offense, that is, Mr. Serra did not fail to pay taxes
5 because of self-aggrandizement or greed. He failed to pay taxes
6 because he has very little money, he does not seek material
7 things, he is a lousy record keeper, and he has devoted his life
8 to his work and a vow of poverty.

9 On the one hand, the Court should consider the nature of
10 this offense and its seriousness. On the other, it should
11 consider the remarkable contributions that Tony Serra has made to
12 our society and certainly to our system of justice. The Court
13 should also consider the impact incarceration of Tony will have
14 on his present clients, who have placed their faith in him. He
15 has a demanding trial schedule that he can fulfill if given the
16 opportunity.

17 For the reasons indicated above, it is respectfully
18 requested that the Court sentence Tony Serra to a period of
19 probation, upon condition that he complete payment of restitution
20 according to the Plea Agreement, and that he serve a period of
21 home detention that allows him to meet his professional
22 responsibilities.

23 Dated: April 5, 2005

24 Respectfully submitted,

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